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Constitutional Law--Warrantless Arrest and Search on the Basis of Informer's Communication--Prosecution's Pre-Trial Invocation of "Informer's Privilege" Held Not Constitutionally Objectionable Per Se (McCray v. Illinois, 386 U.S. 300 (1967))

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appear that clear-cut violations of section 7 by means of conglomerate merger might be more readily challenged than those situations which appear doubtful under the existing standards.

CONSTITUTIONAL LAW — WARRANTLESS ARREST AND SEARCH ON THE BASIS OF INFORMER'S COMMUNICATION — PROSECUTION'S PRE-TRIAL INVOCATION OF "INFORMER'S PRIVILEGE" HELD NOT CONSTITUTIONALLY OBJECTIONABLE PER SE. — Acting on information from a confidential informer that petitioner possessed narcotics, two Illinois policemen arrested petitioner without a warrant, and during a search of his person discovered a package of heroin. Petitioner's motion to suppress the evidence of the heroin was denied, and he was convicted of unlawful possession of narcotics. On appeal, he contended that the hearing on his motion to suppress, where probable cause for arrest was in issue, was constitutionally defective since the judge had refused to compel identification of the informer on whose "tip-off" petitioner was arrested. Rejecting petitioner's claim, the United States Supreme Court *held* that in a state pre-trial proceeding where the only issue is probable cause for arrest, or search, police officers need not be required to disclose the identity of an informer if the trial judge is convinced, by evidence submitted in open court and subject to cross-examination, that the officers did rely in good faith upon credible information supplied by a reliable informant. *McCray v. Illinois*, 386 U.S. 300 (1967).

The informer has long been a familiar figure in the Anglo-American legal system.[1] So valuable is his role in law enforcement that the courts have developed the "informer's privilege"[2] allowing

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[1] *See* Donnelly, *Judicial Control of Informants, Spies, Stool Pigeons, and Agent Provocateurs*, 60 YALE L.J. 1091 (1951). The author comments briefly on the early English practice of approvement. The approver, a party arraigned on a charge of treason or felony, would confess his guilt, and, in order to obtain a pardon, would offer to appeal and convict other criminals (appellees). The approver would be pardoned if the appellees were found guilty, but was hanged if the appellees were acquitted.

[2] Originating in the English courts, the "informer's privilege" was first used to conceal the names of those who disclosed revenue frauds. Rex v. Akers, 170 Eng. Rep. 850 (1790). *See* Note, *An Informer's Tale: Its Use in Judicial and Administrative Proceedings*, 63 YALE L.J. 206, 209 n.26 (1953).

the government to conceal the source of its information.[3] Professor Wigmore provides a modern restatement of the informer's privilege:

> A genuine privilege, on . . . fundamental principle . . . must be recognized for the *identity of persons supplying the government with information concerning the commission of crimes.* Communications of this kind ought to receive encouragement. They are discouraged if the informer's identity is disclosed.[4]

However, the government's interest in keeping the identity of the informer a secret must be balanced against the right of an individual to due process in a criminal proceeding.[5]

The fourth amendment to the United States Constitution prohibits unreasonable search and seizure and provides that no warrant shall issue without probable cause.[6] In 1961, the Supreme Court of the United States, in *Mapp v. Ohio*,[7] held that in order to reinforce the fourth amendment's prohibitions as applicable to the states,[8] all evidence obtained as the result of an unreasonable[9] search and seizure was inadmissible in a state criminal proceeding.[10]

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[3] At times, the privilege has also been extended to the contents of an informer's communication. The Supreme Court of the United States has long recognized the privilege. It is said to be based "upon general grounds of public policy, because of the confidential nature of such communications." Vogel v. Gruaz, 110 U.S. 311, 316 (1884) (contents of the communication to the state's attorney, as well as the identity of the informer, were privileged in an action on the case to recover damages for slander). *See also* Scher v. United States, 305 U.S. 251 (1938) (federal officer following a "tip" is not required to reveal the identity of his informant if it is not essential to the defense). *Cf. In re* Quarles, 158 U.S. 532 (1895) (it is the right of a United States citizen to inform of a violation of the internal revenue laws of the United States and any conspiracy to interfere with this right is punishable).

[4] 8 J. WIGMORE, EVIDENCE § 2374(f) (McNaughton ed. 1961) (footnotes omitted). *See also* Annot., 76 A.L.R.2d 257 (1961).

[5] Roviaro v. United States, 353 U.S. 53 (1957); Wilson v. United States, 59 F.2d 390 (3d Cir. 1932).

[6] "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. CONST. amend. IV.

[7] 232 U.S. 383 (1914).

[8] Wolf v. Colorado, 338 U.S. 25 (1949).

[9] *See* Ker v. California, 374 U.S. 23 (1963), where the Court stated that *Mapp* had not precluded the states from establishing workable rules governing search and seizure, but made it clear that they would have to satisfy the " 'fundamental criteria' laid down by the Fourth Amendment. . . ." *Id.* at 33.

[10] The exclusionary rule had already been established for the federal courts in *Weeks v. United States*, 232 U.S. 383 (1914), but subsequently had been held not applicable to the states in *Wolf v. Colorado*, 338 U.S. 25 (1949).

Although it is clear that the fourth amendment's prohibition of unreasonable searches and seizures applies to seizure of persons, *i.e.*, an arrest, as well as to seizure of property,[11] it is equally clear that the common-law right of a peace officer to arrest and search without a warrant was not eliminated by its adoption.[12] It is a constitutional requirement, however, that the arresting officer act only on probable cause. Probable cause for arrest and search has been said to exist where the facts and circumstances within the arresting officer's knowledge, and of which he has *reasonably trustworthy* information, are sufficient to cause a man of reasonable caution to believe that an offense has been or is being committed.[13]

Where a search or arrest warrant has been obtained, the early dictum in *Grau v. United States*[14] that only evidence competent in a jury trial may be utilized to show probable cause existed, has been superseded by later case law.[15] In a criminal trial guilt must be proved beyond a reasonable doubt, but probable cause requires only a showing of probabilities.[16] In *Jones v. United States*,[17] the Court followed the previously established rule that hearsay may constitute probable cause for the issuance of a warrant. In *Jones*, the search warrant was based solely on an affidavit by a federal narcotics officer reciting that: (1) an unnamed informer had told the affiant that the petitioner was engaged in illegal narcotics traffic, and had sold narcotics to the informer; (2) previously received information from this informer had been correct; (3) the same information had been received from other sources; (4) petitioner and associate were known drug addicts; and, (5) the affiant believed illicit drugs to be secreted in petitioner's apartment. The Court held this was sufficient evidence of probable cause to issue a search warrant, stating that issuance of the warrant was proper "so long as there was a substantial basis for crediting the hearsay."[18]

Draper v. United States[19] established that an arrest *without a warrant* may be based on a communication from an informer to an arresting officer so long as there is a substantial basis for crediting the hearsay. There, a federal narcotics agent was told by an informer, whose information had been reliable and accurate in the past, that the petitioner, whom the agent did not know, was

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[11] Henry v. United States, 361 U.S. 98, 100-02 (1959); Brinegar v. United States, 338 U.S. 160, 164 (1949).

[12] *See* Carroll v. United States, 267 U.S. 132 (1925).

[13] *Id.* at 162; Henry v. United States, 361 U.S. 98, 102 (1959).

[14] 287 U.S. 124 (1932).

[15] Brinegar v. United States, 338 U.S. 160, 175 (1949).

[16] *Ibid.*

[17] 362 U.S. 257 (1960).

[18] *Id.* at 272.

[19] 358 U.S. 307 (1959).

peddling narcotics. The narcotics agent was told that the petitioner had gone to Chicago to obtain a supply and would return by train on a specified day. Acting on the informer's information, the agent met petitioner's train and arrested him without a warrant. In searching him, the agent seized narcotics and a hypodermic syringe. On review of petitioner's conviction for violating the federal narcotics law, the Supreme Court held that the arrest, search and seizure were lawful and the evidence seized was admissible at petitioner's trial.

Subsequent to *Draper* and *Jones*, the Supreme Court clarified the requirements for probable cause when a warrant is sought on the basis of an informer's communication[20] and when an arrest is made without a warrant.[21] In *Aguilar v. Texas*, the affidavit stated: "Affiants have received reliable information from a credible person and do believe that heroin . . . and narcotic paraphernalia are being kept at the above described premises for the purpose of sale and use contrary to the provisions of the law." [22] The Court held that the affidavit did not show probable cause since it failed to show whether the informer had any personal knowledge of the facts he related. It merely stated that the affiants believed the defendant to have narcotics. It stated no facts supporting the belief, nor any information actually received from the informer. *Aguilar* sets forth the rule that where sufficient corroboration is absent, underlying circumstances of both the informer's conclusion of guilt and the conclusion of the officer that the informer is reliable must be put before the reviewing magistrate.[23]

In *Beck v. Ohio*,[24] police officers received unspecified "information" and "reports" about the petitioner. The police, aware of petitioner's prior gambling record, stopped his automobile and placed him under arrest. Although they had no arrest or search warrant they nevertheless searched petitioner's car, but found nothing. Taking petitioner to the police station, they found some clearing house slips on his person. The Court reversed petitioner's conviction for possession of the slips, holding the arrest and search invalid in that no probable cause had been shown.

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[20] Aguilar v. Texas, 378 U.S. 108 (1964).

[21] Beck v. Ohio, 379 U.S. 89 (1964). *See also* Comment, *Informer's Word as the Basis for Probable Cause in the Federal Courts*, 53 CALIF. L. REV. 840 (1965).

[22] 378 U.S. 108, 109 (1964).

[23] *Id.* at 114. *See also* United States v. Ventresca, 380 U.S. 102 (1965), following *Aguilar*. An affidavit for a search warrant may be based on hearsay information as long as the magistrate is informed of some of the underlying circumstances supporting the affiant's conclusions and his belief that any informant involved, whose identity need not be disclosed, was credible or his information reliable. *Id.* at 108.

[24] 379 U.S. 89 (1964).

When probable cause is lacking, all evidence seized during an arrest or search is vulnerable to a motion to suppress.[25] Thus, it becomes important for the defendant to attack the informer's information as insufficient to establish probable cause. However, defendant's attempt to attack the informer's credibility is thwarted by the informer's privilege. The Supreme Court has twice directly confronted the informer's privilege. In *Roviaro v. United States*,[26] the petitioner was convicted of knowingly possessing and transporting heroin unlawfully imported. Two federal narcotics agents were notified by an informer that he was to purchase narcotics from the defendant. One of the agents secreted himself in the informant's car while the other followed closely in a separate car. Defendant entered the informant's car and ordered him to drive to a designated place. After a conversation in the car (overheard by the agent), the defendant ordered the informer to stop the car. Defendant then got out, went to a tree near the road, picked up a package, and threw it into the informant's car, after which he entered another car and drove away. This was observed by the second agent, and upon discovering narcotics in the package, both agents proceeded to defendant's home and arrested him. Defendant was then brought to trial on a two-count federal indictment charging sale and transportation of narcotics. Pursuant to federal procedure, defendant moved for a bill of particulars before trial and requested the identity of the informant. The trial court refused to require disclosure in view of the government's claimed privilege. The Supreme Court held that since the informer had taken a material part in bringing about the defendant's possession of the drugs, had been present with the defendant at the occurrence of the alleged crime, and might have been a material witness as to whether defendant knowingly transported the drugs, disclosure was required.

> We believe that no fixed rule with respect to disclosure is justifiable. The problem is one that calls for balancing the public interest in protecting the flow of information against the individual's right to prepare his defense. Whether a proper balance renders nondisclosure erroneous must depend on the particular circumstances of each case, taking into consideration the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors.[27]

Roviaro is a unique case. Not only was the informant an actual participant in the alleged crime but, besides the government agent, he was the only eye-witness. Furthermore, the issue

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[25] Mapp v. Ohio, 367 U.S. 643 (1961). *See also* FED. R. CRIM. P. 41(e).
[26] 353 U.S. 53 (1957).
[27] *Id.* at 62.

was guilt or innocence at trial, not merely probable cause at a pre-trial hearing. Without the informer's testimony, defendant could not refute the agent's testimony or prove his innocence. Therefore, the informant's personal testimony was essential to a fair trial.

The leading federal case on the issue of disclosure where a valid warrant has been issued is *Rugendorf v. United States.*[28] Three informers, not material witnesses, gave information constituting probable cause for issuance of a search warrant to agents of the Federal Bureau of Investigation. An FBI agent obtained a warrant but did not disclose the names of the informers. The trial court refused to compel disclosure of the informers' identities, and the Supreme Court upheld the conviction. The Court ruled that despite factual errors in the affidavit, the United States Commissioner who issued the warrant had a substantial basis for crediting the facts in the affidavit and the petitioner had failed to develop the criteria of *Roviaro* necessitating disclosure.

On the other hand, the issue of disclosure at a pre-trial hearing when the arrest is made without a warrant had not been decided by the Supreme Court prior to the instant case.[29] The lower federal courts were in conflict, some applying the same rule of nondisclosure in both warrant and nonwarrant cases while others have distinguished the two.[30]

In the instant case, Mr. Justice Stewart addressed himself to the issue of probable cause at the outset by distinguishing *Beck v. Ohio.* Here, unlike *Beck,* each of the officers described with specificity both what the informer actually said and why they thought the information was credible. The testimony of each of the officers informed the court of the underlying circumstances from which the informer concluded that the narcotics were where he claimed they were, and some of the underlying circumstances from which the officers concluded that the informant was credible or his information reliable. The *Aguilar* test was thus met. Applying the *Brinegar* definition of probable cause, the Court found that the Illinois court was fully justified in holding that at the time the officers made the arrest, "the facts and circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the petitioner had committed or was committing an offense." [31] Petitioner conceded that the officer's sworn testimony fully supported a finding of probable cause. However, it was con-

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[28] 376 U.S. 528 (1964).

[29] Comment, *Informer's Word as the Basis for Probable Cause in the Federal Courts, supra* note 21, at 852.

[30] McCray v. Illinois, 386 U.S. 300, 311-12 n.11 (1967).

[31] *Id.* at 304.

tended that the state court nonetheless violated the constitution in sustaining objections to petitioner's questions as to the informant's identity and petitioner sought to challenge the informer's privilege itself as unconstitutional under the fourth, sixth [32] and fourteenth amendments.

The Court rejected petitioner's constitutional challenges finding nothing violative of due process in the settled state law. Under Illinois law, where the issue is the preliminary one of probable cause for arrest or search, rather than guilt or innocence, police officers are not invariably required to disclose an informer's identity if the trial judge is convinced by evidence submitted in open court and subject to cross examination that the officers relied in good faith upon credible information supplied by a reliable informer.[33] While citing with approval cases from the highest courts

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[32] Petitioner's sixth amendment claim was summarily dismissed at the end of the majority opinion and was not discussed by the dissenting justices who apparently saw only the fourth amendment issue as substantial. *Pointer v. Texas,* 380 U.S. 400 (1965), marked the incorporation of the sixth amendment into the fourteenth, thus making the right of an accused to confront the witnesses against him in any criminal proceeding applicable to the states. However, the right of confrontation has not been applied in the context of the informer's privilege and even the lower federal courts which have required disclosure of the informer's identity in the non-warrant cases have relied on the fourth amendment and dicta in *Roviaro v. United States,* 353 U.S. 53 (1957), rather than on the sixth amendment. *See* United States v. Robinson, 325 F.2d 391 (2d Cir. 1963); Cochran v. United States, 291 F.2d 633 (8th Cir. 1961). Relying on its recent decision in *Cooper v. California,* 386 U.S. 58 (1967), the Court stated that if the petitioner's claim was that his sixth amendment rights were violated by the failure of the state to produce the informer to testify against him, it was "'absolutely devoid of merit.'" McCray v. Illinois, 386 U.S. 300, 313-14 (1967). If on the other hand, his claim was that he had been deprived of his right to cross-examine the arresting officers themselves, since their refusal to reveal the informer's identity had been upheld, the Court stated that to accept such a construction of the sixth amendment would mean that "no witness on cross-examination could ever constitutionally assert a testimonial privilege, including the privilege against compulsory self-incrimination guaranteed by the Constitution itself." *Id.* at 314.

[33] Illinois law is contained in the following series of cases: People v. Connie, 34 Ill. 2d 353, 215 N.E.2d 280 (1966) (unlawful possession of hypodermic needles and syringe, *held* failure to require disclosure did not deny the defendants their constitutional right to due process or their right to have compulsory process for obtaining witnesses in their favor); People v. Durr, 28 Ill. 308, 192 N.E.2d 379 (1963) (unlawful possession of narcotics; disclosure not required). *Cf.* People v. Pitts, 26 Ill. 2d 395, 186 N.E.2d 357 (1962) (unlawful possession of narcotics; a volunteered statement by a person unknown to the police did not constitute reasonable grounds for arrest of the defendant without a warrant). People v. Parren, 24 Ill. 2d 572, 182 N.E.2d 662 (1962) (narcotic prosecution; under the circumstances the search without a warrant was unreasonable where officers acted on an anonymous tip).

of several states which follow a rule similar to that of Illinois, the Court emphasized that there must always be a balancing between the public interest in protecting the flow of information and the individual's right to prepare his own defense. Mr. Justice Stewart stated: "What Illinois and her sister states have done is no more than recognize a well established testimonial privilege, long familiar to the law of evidence." [34]

Great weight was placed on the Court's reluctance to compel disclosure in *Roviaro* in spite of the fact that the issue in that case was guilt or innocence at trial and not just probable cause at a pre-trial hearing on a motion to suppress.

> What *Roviaro* . . . makes clear is that this Court was unwilling to impose any absolute rule requiring disclosure of an informer's identity even in formulating evidentiary rules for federal criminal trials. Much less has the Court ever approached the formulation of a federal evidentiary rule of compulsory disclosure where the issue is the preliminary one of probable cause, and guilt or innocence is not at stake.[35]

Here, the arresting officers testified in open court, fully and in precise detail, as to what information they had received from the informer and why they had reason to believe the information was trustworthy. Each officer was under oath and subjected to cross-examination. This obviously satisfied the judge that each was telling the truth.

Mr. Justice Stewart further reasoned that to require a state court judge at a preliminary hearing to require disclosure in every case would be to assume that the arresting officers were committing perjury. He concluded that the fourteenth amendment did not require such an assumption and that to make such an assumption would be an unjustified encroachment by the Court upon the constitutional power of the states to promulgate their own rules of evidence.

In a strong dissenting opinion, Mr. Justice Douglas took the position that the majority had effectively made the police the sole arbiters of probable cause: "There is no way to determine the reliability of Old Reliable, the informer, unless he is produced, at the trial and cross-examined. Unless he is produced, the Fourth Amendment is entrusted to the tender mercies of the police." [36] It was further contended that the majority was encouraging warrantless arrests and searches while the whole momentum of criminal law administration should be in the opposite direction.

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[34] 386 U.S. at 308.
[35] *Id.* at 311.
[36] *Id.* at 316 (dissenting opinion).

In upholding petitioner's conviction, the Court has approved the evidentiary rule of non-disclosure followed in many jurisdictions. Among the states with a rule similar to that of Illinois are California,[37] New Jersey[38] and New York.[39] The Court has sanctioned the prosecution's use of a valuable tool in criminal law administration.

The argument of the dissent in *McCray* emphasizes that disclosure is the best procedural safeguard for determining whether there was actual probable cause in a non-warrant case.[40] Proponents of disclosure have contended that, without independent verification of probable cause, the defendant must "take the officer's word for it."[41] There is always a danger that the arresting officer may misrepresent his connection with the informer, his knowledge of the informer's reliability, or the information allegedly obtained from the informer.[42] Therefore, it is argued, disclosure of the informer's identity is the most effective way to determine his reliability. However, the force of this argument is diminished when it is taken in the context of *McCray*, *i.e.*, a pre-trial proceeding, where guilt or innocence is not at stake. Here, the evidence obtained is of no less probative force if illegally seized. The defendant is trying to suppress the "untarnished truth," and that he may be allowed to is due not to the quality of the evidence but rather to the need to deter law enforcement officials from violating the fourth amendment. It would seem that the fourth amendment is satisfied if the judge who hears the motion to sup-

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[37] CAL. EVIDENCE CODE § 1042(c). An earlier California case, *Priestly v. Superior Court*, 50 Cal. 2d 812, 330 P.2d 39 (1958), requiring disclosure, effectively eliminated the informer's privilege in California. Practical exigencies led to its return.

[38] State v. Burnett, 42 N.J. 377, 201 A.2d 39 (1964).

[39] People v. Coffey, 12 N.Y.2d 443, 191 N.E.2d 263, 240 N.Y.S.2d 721 (1963) (prosecution for third-degree burglary: "withholding the identity of the informer did not destroy the reliability of the proof offered as to probable cause and did not on this record constitute error prejudicial to the defendant"). *Id.* at 448, 191 N.E.2d at 264, 240 N.Y.S.2d at 723. *Compare* People v. Malinsky, 15 N.Y.2d 86, 204 N.E.2d 188, 255 N.Y.S.2d 850 (1965) (disclosure of the informer's identity is required only in cases where there is insufficient evidence apart from the arresting officer's testimony as to the informer's communication to establish probable cause. Where, so far as record shows, police had no evidence to establish probable cause for defendant's arrest in absence of information received from allegedly reliable informer and arresting officer's testimony as to such information was unconfirmed, informer must be identified to defendants).

[40] For a discussion of both sides of the disclosure issue *see also* Comment, *Disclosure of Informer's Identities*, 17 HASTINGS L.J. 99, 102-03 (1965-66).

[41] *See* United States v. Robinson, 325 F.2d 391, 393 (2d Cir. 1963) (the defendant was not required to "take the officer's word for it" and disclosure was required).

[42] *See* United States v. Pearce, 275 F.2d 318, 322 (7th Cir. 1960).

press has discretion to order disclosure if he feels it necessary to determine the credibility of the arresting officer.

The importance to the administration of justice of maintaining the informer's privilege has often been emphasized, and the state courts have vigorously defended it. Chief Justice Weintraub of the New Jersey Supreme Court argues that if the defendant may require disclosure, he will do so in all cases. Certainly he has nothing to lose and he may gain the suppression of damaging evidence. As a result:

> the State could use the informant's information only as a lead and could search only if it could gather adequate evidence of probable cause apart from the informant's data. Perhaps that approach would sharpen investigatorial techniques, but we doubt that there would be enough talent and time to cope with crime upon that basis. Rather we accept the premise that the informer is a vital part of society's defensive arsenal. The basic rule protecting his identity rests upon that belief.[43]

The dissenting judge in *People v. Durazo* [44] noted that in California the great majority of narcotics arrests result from the use of informers, and that subsequent to California decisions limiting the informer's privilege, law enforcement in the narcotics area had become "comparatively ineffective." [45] "Obviously it becomes impossible to solicit the assistance of informers where their identity is required to be revealed and they are thus exposed to retaliation on the part of narcotic violators." [46]

That there is a real danger of retaliation when the informer's identity is disclosed is well illustrated by the notorious case of Arnold Schuster, who was murdered after informing on bank-robber Willie Sutton.[47] While violence does not always accompany disclosure of an informer's identity, retribution often does take the form of suits for false arrest and malicious prosecution.[48]

The recent report of the President's Commission on law enforcement provides significant comment on the overwhelming social importance of preserving the informer's privilege. The report devotes an entire chapter to illustrating the intricate hierarchical

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[43] State v. Burnett, 42 N.J. 377, 201 A.2d 39, 43-44 (1964).

[44] 52 Cal. 2d 354, 340 P.2d 594 (1959).

[45] *Id.* at 358-59, 340 P.2d at 597 (dissenting opinion). "Since 1952 there has been a state-wide increase of 68 per cent in arrests based on a fixed population. The corresponding increase in convictions, however, has been but 10 per cent." *Ibid.*

[46] 52 Cal. 2d at 358-59, 340 P.2d at 597.

[47] *See* Schuster v. City of New York, 5 N.Y.2d 75, 154 N.E.2d 534, 180 N.Y.S.2d 265 (1958).

[48] *See, e.g.*, Vogel v. Gruaz, 110 U.S. 311 (1884); Stelloh v. Liban, 21 Wis. 2d 119, 124 N.W.2d 101 (1963).

structure of criminal activities. The basic problem in combating organized crime, according to the Commission, is procedural rather than substantive.[49] The lack of success in efforts to curb the growth of organized crime in America was attributed chiefly to the difficulties of obtaining proof.[50] Some citizens believe that there is a social stigma attached to the role of an "informer," but chiefly there is fear of retribution.

> Law enforcement may be able to develop informants, but organized crime uses torture and murder to destroy the particular prosecution at hand and to deter others from cooperating with police agencies. Informants who do furnish intelligence to the police often wish to remain anonymous and are unwilling to testify publicly. Other informants are valuable on a long-range basis and cannot be used in public trials.[51]

Therefore, it appears that the informer's privilege is a valuable and necessary aid to law enforcement.

The Commission illustrates why informers have become the central tool of police in combating narcotics violations. It points out that the goal of law enforcement in this area is to reach the highest possible sources of drug supply. This is quite difficult because of the fact that drug transactions are always consensual. "There are no complaining witnesses or victims; there are only sellers and willing buyers." [52] Since the law enforcement officer must initiate the case, undercover investigation is essential. "The use of informants to obtain leads and to arrange introductions is . . . standard and essential." [53] According to the Commission, the informant is typically facing charges himself and agrees to give information needed for the "big case" in return for a reduction in charges on the condition that his identity remain confidential. This practice is exemplified by the fact that in the narcotics area, the brunt of enforcement has fallen heavily upon the user and the addict.[54]

The *McCray* case may be examined in at least two contexts. In one, it stands as the culmination of recent cases that have sought to test the informer's privilege either collaterally or directly.

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[49] REPORT BY THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, at 200 (1967).

[50] *Id.* at 198.

[51] *Ibid.*

[52] *Id.* at 218.

[53] *Ibid.*

[54] In cases handled by the Federal Bureau of Narcotics, more than 40% of the defendants prosecuted are addicts. The emphasis on enforcement through the addict is due to his constant exposure to surveillance and arrest and his potential value as an informant. *Id.* at 219.

In *Hoffa v. United States*,[55] the defense attacked the use of a government informer on the general grounds that it violated the historic notions of fair play of English speaking peoples. The Court summarily rejected that argument, stating that while secret government informers are no less free from relevant constitutional restrictions than are any other government agents, their use is not *per se* unconstitutional.[56]

In *Lewis v. United States*,[57] the Court reiterated that the Government was entitled to use decoys and to conceal the identity of informers. The Court held that the deceptions by the agent were not unconstitutional. A rule abolishing all deceptions and requiring compulsory disclosure would "severely hamper the Government" in the enforcement of narcotics laws.[58]

In the context of these recent cases, and the emphasis on combating organized crime exemplified by the establishment of the President's Commission on Law Enforcement and Administration of Justice, *McCray* might indicate a more conservative approach by the Court in this area of procedural due process.[59] The President's Commission has suggested legislation that would substantially alter the administration of criminal justice. One recommendation calls for a general witness immunity statute enacted at both federal and state levels providing immunity sufficiently broad to assure compulsion of testimony.[60] Such a measure could greatly increase the flow of information provided by the criminal. A second important recommendation is a provision that would allow the prosecution a broad right of appeal from motions to suppress evidence or confessions.[61] If, indeed, *McCray* does mark a conservative turn by the Court, it may well be willing to sustain legislation enacted in response to the Commission's recommendations.

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[55] 385 U.S. 293 (1966).

[56] *Id.* at 311.

[57] 385 U.S. 206 (1966).

[58] *Id.* at 210. *See also* Osborn v. United States, 385 US. 323 (1966) (conviction for endeavoring to bribe a member of a jury panel; a tape recording authorized by a magistrate which related a conversation between the informer and the defendant was admissible at trial).

[59] *Compare* the Court's earlier willingness to extend procedural constitutional rights beyond the trial level in such cases as Miranda v. Arizona, 384 U.S. 436 (1965) and Escobedo v. Illinois, 378 U.S. 478 (1963). *See also* the reaction to *McCray* in the news media. "For every Supreme Court action aimed at guaranteeing the rights of the accused, there is a reaction that the court is hindering the police. . . . [In *McCray*] the court issued a ruling that helped instead of hindered law enforcement." TIME, March 31, 1967, at 73. "The ruling . . . will do much to ease the widespread complaints by the police that the decision in 1961 [Mapp v. Ohio] had 'handcuffed' them." N.Y. Times, March 21, 1967, at 20, col. 3 (city ed.).

[60] *Supra* note 49, at 140.

[61] *Supra* note 49, at 141.

On the other hand, viewed in a larger historical context, *McCray* might merely be a timely reiteration of settled law. If the decision is approached from the viewpoint of the ancient informer's privilege, the Court appears to be striking a balance in favor of the public interest in the free flow of informer's information in an area where, if the accused fails to suppress the "untarnished truth," [62] he will not be prejudiced in his right to a fair trial.

Viewed in this light, the Court is emphasizing that constitutional rights are not absolutes. Here, as in other areas, interests must be balanced.[63] The Court has reasoned that the detrimental effect that a decision requiring disclosure of the informer's identity in cases of warrantless arrests would have on the administration of criminal justice cannot be justified merely to grant the accused the opportunity to challenge the testimony of a witness whose presence is not necessary to the determination of his guilt or innocence.

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[62] McCray v. Illinois, 386 U.S. 300, 307 (1967).

[63] *For example*, freedom of speech and press. Uphaus v. Wyman, 360 U.S. 72 (1959) (one of the many cases expressing the "balancing" test).